No. 700

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

C. K. KING, as Administrator of the Estate of J. W. Smith, deceased,
Plaintiff in Error,

vs.

CHARLES H. SMITH and THE CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY (a corporation),
Defendants in Error.

Brief of Plaintiff in Error.

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BRIEF OF PLAINTIFF IN ERROR.

Statement.

This is an action at law in the form of replevin brought by the defendant in error, Charles H. Smith, against the plaintiff in error and the California Safe Deposit and Trust Company, to recover one hundred and ninety bonds of the California and Nevada Railroad, valued at $47,500.

The defendant in error, Charles H. Smith, claims

title to the bonds by gift from his father, J. W. Smith. The plaintiff in error denies any such gift and claims the bonds as the administrator of the estate of the said J. W. Smith. The defendant in error, California Safe Deposit and Trust Company, makes no claim of ownership, but, being in possession of the bonds as bailee, holds them as against both the other parties for its own protection.

The facts out of which the controversy arose are as follows:

J. W. Smith died on the 15th day of November, 1895. For many years prior to his death he was the owner of 304 bonds of the California and Nevada Railroad, which included the 190 bonds involved in this action. On March 15, 1893, J. W. Smith entered into an agreement with one J. S. Emery for the sale to the latter of the 304 bonds. This agreement provided for the payment of the price of the bonds in installments, the bonds being deposited during the existence of the contract in escrow with Abner Doble until full payment should be made by Emery. This agreement was not carried out, and another agreement, dated October 24, 1893, was substituted, wherein J. W. Smith agreed to sell the bonds to F. M. Smith upon the terms therein provided. The agreement last mentioned was for an option, to continue for one year, and contained a provision for its extension for an additional year upon the same terms and conditions. This agreement was not carried out during the first year, and it was accordingly extended

for the additional year and finally expired on October 24, 1895 (trans. p. 49). Under this second contract the bonds were continued on deposit with Abner Doble in escrow to be delivered to F. M. Smith upon his compliance with the stipulations therein contained; otherwise Doble was to return the bonds to J. W. Smith or his legal representatives (trans. p. 49). F. M. Smith failed to comply with the terms of the contract, and after October 24, 1895, the bonds were subject to the order of J. W. Smith.

About the 15th day of June, 1895, J. W. Smith was taken sick and never recovered. He gradually grew worse until death relieved him. His ailment seems to have been some form of kidney disease (trans. p. 83). For some time prior to August 14, 1895, he had been exceedingly weak, never leaving his room, and moving about with the aid of a chair, steadying himself with the chair and shoving it along before him (trans. p. 60, 84). At that time he was about eighty years of age. His son, Charles H. Smith, was then living with him at the house of a Mrs. Stewart, in Oakland. Charles had come from Denver the latter part of July and remained with his father until the 2d or 3d of September.

A short time prior to the 14th day of August, 1895, it is claimed by Charles H. Smith that his father delivered to him a memorandum containing a list of all his real estate and directed him to draw up deeds to the various pieces of property; that he did so, and thereafter, on the 14th day of August, 1895, a notary was

called in and several deeds were executed by J. W. Smith (trans. pp. 129–130) by which he transferred his real estate to his children, of whom there were seven, Charles H. Smith receiving an undivided two-thirds interest in a block of land in Oakland; that on the same day, and prior to the call of the notary, J. W. Smith executed to him, said C. H. Smith, an assignment of the 304 bonds in question. This assignment is known as "Plaintiff's Exhibit G" (trans. p. 79). There was no delivery of the bonds, actual or symbolical, at this time.

Charles H. Smith claimed title to the bonds on the trial by virtue of this assignment. The plaintiff in error, however, claimed that it was spurious, that it had been written over an old signature of J. W. Smith, and submitted evidence in support of that claim. The result was that the Court severely criticized the instrument, characterized it as suspicious, and in deciding upon the facts found neither for nor against the assignment, dismissing it from consideration after passing its strictures upon it (trans. p. 31), and decided the case in favor of Charles H. Smith solely upon other evidence in the case, which will be detailed hereafter. Nor did the Court rely to any extent upon the testimony of Charles H. Smith in arriving at its conclusions upon the facts. Therefore, as claimed on the oral argument, this assignment, and the testimony of Charles H. Smith in relation thereto, are entirely removed from consideration in this case as facts. As no finding upon the

validity of this document was made by the trial Court, this Court must regard it upon this appeal as not proved, and disregard it entirely in their consideration of the case.

Some of the suspicious circumstances connected with this alleged assignment are the following:

It was written upon common printing paper (trans. p. 159) and was about five inches in length by about two inches in width.

It is claimed that J. W. Smith, while lying in bed, handed this scrap of paper to his son and directed him to write a bill of sale upon it (trans. p. 128) when there was the usual character of writing paper in the room and on the desk, and no reason is given why paper of that character was not used.

The body of the assignment was written by Charles H. Smith (trans. p. 133), the first two or three lines in a free hand but the remainder cramped, the lines crowded close together, and having an upward tendency as though attempting to "dodge" the signature.

The signature is of heavy black ink (trans. p. 155) showing the oxidation resulting from age, while the ink in the body is blue black (trans. p. 154) and, as testified to by the expert, much more recently written (trans. p. 154).

J. W. Smith was accustomed to write with blue ink and seemed to prefer it (trans. p. 120). The entries in Capt. Thomas' notarial record, written in J. W. Smith's

room when the deeds were executed, are in blue ink. The same ink was used in all the business transactions at that time (trans. p. 82); yet no blue ink appears on the assignment.

The assignment, evidently written on thin printing paper, is pasted on a piece of white paper, and bears the marks of scissors on the edges (trans. p. 158).

The signature, which is doubtless the handwriting of J. W. Smith, is firm and strong, the lines perfect and the shading uniform (trans. p. 159), the concluding line of the "h" is drawn out in a long horizontal line, as is also the cross of the "t". The whole signature bears a most striking resemblance to a signature of J. W. Smith made ten years before the date of the assignment (trans. p. 158); and it is entirely unlike the signatures made near the date of the assignment (trans. p. 158). They are weak and tremulous, almost invariably in blue ink, and all surrounded by a peculiar scroll extending clear around the signature which was adopted by J. W. Smith after his signature had been forged some years before the date of the assignment (trans. p. 93). Upon these general features of the signature the opposing experts were in practical agreement. Even to the unpracticed eye it appears manifest that it was a physical impossibility for J. W. Smith, in his condition at that time, to have written that signature.

The assignment was not acknowledged, although the

notary was in the house that day after the alleged signing (Plff 's. Ex. G.).

Afterwards, when C. H. Smith obtained possession of the bonds, one day before his father's death, and gave a receipt therefor signed "J. W. Smith by C. H. Smith", he did not produce the assignment nor mention it (Dfts. Ex. 5.) and (trans. p. 137).

When sending a receipt for seventy-five of the bonds to the Central Trust Co. of New York to have bonds issued in lieu thereof, he did not produce the assignment (trans. p. 137).

It was not produced in evidence nor shown the plaintiff in error at any of the many hearings in the Superior Court of Alameda County when the question in issue was whether or not the bonds belonged to C. H. Smith or the estate of J. W. Smith (trans. p. 138).

Nor was it produced at the hearing of a foreclosure suit in the Circuit Court where the ownership of the bonds was in issue (trans. p. 140).

Never was it brought forth until a few days before the trial of this case, when it was produced at the taking of the deposition of the witness Palmantier, who, although friendly with C. H. Smith, had never seen nor heard of it before (trans. pp. 79–80).

And by such a document it was claimed that the title to bonds, then valued in the option contract at $212,000, passed to C. H. Smith as a gift!

(See Judge Morrow's comments on this document, trans. pp. 30 to 32.)

So far, therefore, as this assignment is relied upon to prove a gift of the bond, the case must fail, for the execution of the assignment was not established to the satisfaction of the Court.

What, then, is the evidence upon which the Court acted in deciding that a valid oral gift was made of the bonds?

Abner Doble testified in substance as follows: "*I cannot remember distinctly* how I happened to deliver these bonds to Mr. Smith upon this receipt (defendant's Exhibit 5), only *I think*, *my impression is*, that Captain J. W. Smith told me that the bonds belonged to Charlie Smith and to give them to him. I had seen J. W. Smith a *short time* before this occurrence. I was over there to see him a short time before he died. * * * I did not talk much with him about his business at that time. *He was not in a condition to talk much and I did not talk with him much. What he did talk I cannot recall to mind.* * * * *My impression is* that he told me that the bonds belonged to Charlie, and to deliver them to him. *I think* that is why I did so. *I think* that conversation was the ground work of my delivering the bonds to his son." The witness further testified that he did not remember getting any order from J. W. Smith for the delivery of the bonds; that he was seventy-one years old, had been hurt by a railroad car,

and finds that he forgets things often and his memory is not as good as it was before he was hurt (trans. pp. 67 to 70). His testimony throughout is filled with such expressions as "I don't remember", "I am not sure", "my impression is", "I don't call to mind" and other similar expressions. He is sure of nothing, but he delivered the bonds to Charles H. Smith as his father's property, if the receipt is any indication, for it was signed "J. W. Smith by C. H. Smith" (trans. p. 56). On its face the receipt imports that C. H. Smith was acting as his father's agent in the transaction, unless such inference is overcome by Mr. Doble's impressions.

W. G. Palmantier testified, in a deposition taken several days before the trial, that he had been acquainted with J. W. Smith since before 1890, that he commenced to do business with the bank with which witness was connected about 1891 or 1892, and continued to do so up to the time of his death. "At one time I remember he said, 'Well, I don't own anything in the world; I have disposed of everything', and he told me that he had turned over, made deeds of the property to his *daughter*, and also that he had *turned over* the bonds of the California and Nevada Railroad to Charles H. Smith." He had a box in the bank, and witness had a *written order* to deliver the box to C. H. Smith upon the death of J. W. Smith. Witness further testified that he talked with J. W. Smith two or three times about the disposition of his property, the first occurring

within a month of his death; that he did not remember the circumstances of the first conversation because J. W. Smith did not call him there. "He told me *he calculated* that Mr. Smith *would have* the California and Nevada Railroad, Mr. C. H. Smith, and I think it was then that he talked to me about giving his daughter some real estate and property, but not as fully as he did when Mr. King came. I cannot recollect the exact language, but as near as I can recollect *he calculated that Charles H. Smith had the bonds*, OR *they were his*, OR *they belonged to Charlie*, OR *that he had given them to him already*, and I think that he had disposed of them. I wouldn't attempt to state just what he said. I think the next conversation was some couple of weeks before his death, when Mr. King came for me, but it might not have been more than a week. * * * As near as I can state, J. W. Smith said, 'Life is uncertain and we don't know how long we will remain here', or something of that kind, and then he said, 'I have made deeds to my property', and in fact he says in this way 'I don't own anything in the world'. He told me that a couple of times, and that he *had given* the bonds of the railroad to Charles H. Smith, and had disposed of his property by deed to some of his daughters, and had given something to another son, I think. As near as I can recollect is, 'that he had *turned the bonds over;* that he had *given them* to him; that they *were turned over* to Charles H. Smith'. * * * In the presence of C. H. Smith he said, 'I don't own a dollar in the world'.

He told me he had disposed of his property by deed to his daughter, and I think something to his son, and that he had *turned over* his bonds to Charles. He said 'I *have given and turned over* my bonds to C. H. Smith'. I am not attempting to state the exact language." Witness further stated that he saw J. W. Smith the day before he died, and thought he knew him, but would not be sure. He could see that the man was nearing death (trans. pp. 71 to 79).

W. R. Thomas, the notary who took the acknowledgments to the deeds, testified that before August 14, 1895, J. W. Smith had told him that he was going to *deed* all of his property before his death, and on August 14, 1895, had said that "he was *deeding* his property to his children and wanted to acknowledge the deeds and for me to put on the seal. He said nothing further at that time in relation to the deeds" (trans. p. 81). This witness says nothing about the bonds or any assignment or gift of the bonds, although that was the *very day* on which the assignment was supposed to have been executed. His failure to mention it to Thomas is significant.

Charles K. King testified that Charles Smith came out from Denver in June or July, 1895, and that J. W. Smith talked to witness about that time—it may have been either before or after. "He said that he had given away his property to his children, that is, I don't know whether he said all of it; *most* of his property, I think he said, and that his son *would have the—that he*

had given his son the railroad" (trans. p. 117). "From what he said to me and from what his son said also I did not put the bonds in the inventory of the estate" (trans. p. 118). Mr. King also testified, at different times and places, sometimes that J. W. Smith had said that he had given the *railroad* to Charles, and again that he had given the *bonds* to Charles. In his deposition taken a week or so before the trial he said "railroad", and on the trial said "railroad"; then changed to "bonds". He said further that what he had done toward the recovery of the bonds had been pursuant to the demands of the heirs, and by direction of the Court; that he had taken no action on his own account (trans. pp. 123, 124).

On Sept. 11, 1895, a month nearly after he claims the bonds were given him, Charles H. Smith wrote to C. K. King saying, among other things: "Keep me posted about the California-Nevada. *I hope* FATHER *will be able to get out of it*" (trans. p. 111).

On Nov. 24, 1897, two years after J. W. Smith's death, Charles H. Smith wrote to W. R. Davis a long letter containing the language set out in the opinion of the Circuit Judge (trans. p. 33), and also the following: "As a matter of fact all the personalty owned by my father at his death belongs to me, and I have a paper showing that to be the case, and which can be pretty nearly construed as a will" (trans. p. 147). (And also see this paper, Defendant's Exhibit 25, p. 150.)

The evidence shows no delivery of the bonds until November 14, 1895 (trans. p. 56), the day before J. W. Smith's death. On that day J. W. Smith was in a condition of unconsciousness or stupor, and consciousness never returned (trans. pp. 59–61–63). After Charles H. Smith returned to Denver about September 2nd, he was not in Oakland again until about four days before his father's death (trans. p. 60). Mr. King testifies that when C. H. Smith arrived he thought he recognized his son and said "Charlie" or something like that. When King said to him "Here is Charlie come to see you" he never answered (trans. p. 58). "I never saw Mr. Smith engage in talking with anybody or answer questions of anybody after Charles H. Smith came there except the time he said Charlie" (trans. p. 59).

Mrs. Stewart, who lived in the same house as J. W. Smith, and who had known him for seven years, testified that she saw him every day for some time prior to his death, and that he did not talk to anybody for four or five days before his death, and for two days before his death was unconscious and in a stupor (trans. pp. 60–63).

Capt. Thomas testified that he saw J. W. Smith the day before he died, and said, "I did not attempt to have any conversation with him at that time. He was then in his bed lying down flat. His eyes were closed" (trans. p. 84).

Charles H. Smith testified that from the time of his

arrival in Oakland up to the time of his father's death he was with him most of the time, (p. 60) yet he did not testify as to his condition, mental or physical, during that time. *Neither did he testify to any oral gift or any words of gift whatever, aside from the written assignment.*

The correspondence between father and son shows that their relations were pleasant. C. H. Smith acted for his father in the drawing of the deeds, and discussed the disposition of his property with him. They had a common bank account at the Central Bank against which either could check. The letter of C. H. Smith to W. R. Davis (trans. pp. 141 to 150) shows entire familiarity with his father's affairs. This testimony shows a confidential relation between C. H. and J. W. Smith, as was held by the trial Court (trans. p. 34).

The letter above referred to (Defendant's Ex. 24) shows that J. W. Smith was rather heavily in debt at the time of his death.

The foregoing is, we believe, the substance of all the testimony upon which this Court is asked to decide that J. W. Smith, while old, weak, infirm and in his last illness, and while in debt, orally gave to his son, Charles H. Smith, toward whom he stood in a relation of trust and confidence, and who had already been provided for in the deeds, and who stands before this Court in the attitude of presenting to it as genuine a document so suspicious as to be cast aside by the trial

Court, bonds then valued at over $200,000, to the exclusion of his other children and his creditors.

Assignment of Errors.

On this writ of error the plaintiff relies upon the following assignments of error, to-wit:

(2) That the Court erred in finding so much of the finding of fact numbered 2 as reads as follows:

"The plaintiff, on the 26th day of September, 1900, was, ever since has been, and still is the owner and entitled to the possession of the property described in the complaint."

(3) That the Court erred in finding that at the time of the commencement of the action, or on the 26th day of September, 1900, the plaintiff was the owner of the property described in the complaint.

(4) That the Court erred in finding that on the 26th day of September, 1900, or at the time of the commencement of the action, the plaintiff was entitled to the possession of the property described in the complaint.

(6) That the Court erred in finding so much of finding of fact numbered 2 as reads as follows:

"The defendants at all said dates and times unlawfully withheld and now retain the possession of said property described in plaintiff's complaint from the possession of plaintiff."

(8) The Court erred in making finding of fact num-

bered 4, which reads as follows:

"That neither defendant King, as administrator of the estate of J. W. Smith, deceased, nor said estate of J. W. Smith, deceased, has or ever had any interest in said property and the defendant C. K. King, as administrator of said estate, is not entitled to the possession of said personal property, or any part thereof, nor is said defendant corporation entitled to longer hold possession thereof from plaintiff."

(9) The Court erred in so much of finding numbered 4 as states that the defendant King, as administrator of the estate of J. W. Smith, deceased, has not, or ever had, any interest in the property described in the complaint, and that said defendant King, as such administrator, was not entitled to the possession of said personal property or any part thereof.

(10) The Court erred in so much of finding numbered 4 as states that the estate of J. W. Smith, deceased, has not, and never had any interest in the property described in the complaint, and is not entitled to the possession of said personal property or any part thereof.

(11) The Court erred in its finding that said corporation is not entitled to longer hold possession of said personal property from the plaintiff.

(12) The Court erred in its conclusion of law which reads as follows:

"That the plaintiff is entitled to recover of and from

the defendants the possession of the property alleged and set forth in plaintiff's complaint; and that defendants unlawfully withhold the possession thereof."

(13) That the Court erred in making, rendering and giving the judgment given, made, and entered in this case, for the reason that the same is against law, and contrary to the evidence.

(14) That the Court erred in giving and rendering judgment in favor of the plaintiff (defendant in error) and against the defendant King (plaintiff in error).

(15) That the Court erred in finding that the evidence was sufficient to show that plaintiff was at any of the times mentioned in the complaint, the owner, or entitled to the possession of the property described in the complaint or any part thereof.

Argument.

All of the foregoing assignments, while set out in different ways, raise but the single proposition of law involved in this case, viz.:

Is the evidence sufficient, under the law relating to gifts, and in view of the existing confidential relation, to establish a valid and legal gift of the bonds involved in this action?

This proposition, however, for convenience of discussion may be subdivided and affirmatively stated as follows:

1. *Aside from the confidential relation, the evidence*

is insufficient to establish an oral gift.

2. *The existence of a confidential relation, and the suspicious facts appearing in the record, raise a presumption of the illegality of the gift, which the evidence is not sufficiently clear and strong to overcome.*

I.

Viewed in its most favorable light to sustain the judgment, we think the evidence falls far short of establishing a legal gift, even without considering the relation of trust and confidence existing between the parties.

It was evidently the intention on the trial to make the assignment (Plaintiff's Exhibit G), the *basis* of the claim of gift, and use the declarations of J. W. Smith in *corroboration* of the execution of the assignment. But as this basis is swept out of consideration by the refusal of Judge Morrow to find its execution as a fact, defendant in error is driven to rely upon these declarations as evidence of an *oral* gift, as to which there is *no direct testimony*, even by C. H. Smith himself, neither as to the time, words of gift, nor any other essential fact.

As there is no direct evidence in the record of any gift aside from the discredited assignment, let us consider whether these declarations and other circumstances are sufficient to establish a formal gift.

The testimony of Thomas, King, Palmantier and Doble was taken between five and six years after J. W. Smith's death, and doubtless neither of these gentlemen then had cause to believe that they would be called upon to state those conversations after the lapse of that time. They do not attempt to state the exact language. In the nature of things they could not. Mr. Palmantier states that J. W. Smith said that "he calculated" that his son "would have" the bonds, *or* the railroad; again, that "he calculated" that his son "had" the bonds, "*or* that they were his, *or* they belonged to Charlie, *or* that he had given them to him already". Again, that he had "turned the bonds over", that "he had given them to him". Again, "I have *given and turned over* my bonds to C. H. Smith" (trans. pp. 77–78). These statements are not only insufficient but irreconcilable, and serve only to show how treacherous is the human memory. None of these expressions, even the use of the word "given", imports a formal gift, as was held by Justice Harrison in

White v. *Warren*, 120 Cal. 327.

In *Giselman* v. *Starr*, 106 Cal. 651, it appeared that a father had made declarations that he had given a note and mortgage to his incompetent daughter. He was her guardian and went so far as to incorporate the note and mortgage in the inventory as her property. No declaration could be more formal, yet the Court held that no valid gift was shown.

In *Estate of Rathgeb*, 125 Cal. 302, the deceased had

given an order for the delivery of personal property. There was also other testimony as to a gift, but *no word or act of gift. Held*, that the evidence was insufficient to establish a gift.

If the testimony of Palmantier is not sufficient under the above authorities to establish a valid gift, how much less effective must be the weaker testimony of the other witnesses. King, who is making a contest for the bonds only by express direction of the Superior Court of Alameda County, and with whom C. H. Smith seems to be on quite friendly terms (see Deft's. Ex. 24), testifies that J. W. Smith told him that "his son *would have* the—that he had given his son the railroad" (trans. p. 117). Here is a direct contradiction in the same sentence. The words "would have" cannot by any construction be reconciled with a present or past gift of the bonds. They refer solely to the future. The rest of King's testimony is not definite and certain, for while in his deposition taken a few days before the trial he said the statement was that J. W. Smith had given his son the "railroad", on the trial he changed the word to "bonds" (trans. p. 123).

Capt. Thomas, the notary, does not mention the bonds at all. Smith did not declare to him that he had given the bonds to Charles, although he was supposed to have executed the alleged assignment but a few hours before. Smith's statement to him was that he had *deeded* away his property, referring, of course, to the deeds executed that day. Neither this statement,

nor the statement to Palmantier that he "did not own anything in the world" can be taken to mean that all his property had been transferred, for the record shows that he left estate which was actually administered upon and sold under order of the Probate Court for $4,482.50, and appraised for $9,090.10. This condition is incompatible with that declaration.

The testimony of Doble is so filled with such expressions as "my impression is", "I think", "I can't call to mind", etc., as to be utterly useless in connection with his admitted failure of memory, to furnish that character of evidence which the law calls "satisfactory". It must be placed in the category of "slight" evidence, if worthy of notice at all.

"That evidence is deemed *satisfactory* which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated *slight* evidence."

Code Civil Procedure, Sec. 1835.

This weak and unsatisfactory evidence is rebutted by the very nature of the transaction between C. H. Smith and Doble; for if Doble actually believed that the bonds *belonged* to Chas. H. Smith what object could be subserved by taking a receipt signed "J. W. Smith, by C. H. Smith"? This receipt raises a presumption of agency which Doble's testimony is not strong enough to overcome.

In connection with C. H. Smith's total failure to testify to any other word or act of gift than the discredited

assignment, and the adverse presumption of law which that failure raises (*C. C. P.*, Sec. 2061, subd. 7), let us notice the declarations of C. H. Smith himself with reference to these bonds. In Defendants' Exhibit 23 (trans. p. 141), a letter written to King by C. H. Smith less than a month after the supposed gift, Smith says: "Keep me posted about the California-Nevada. *I hope father will be able to get out of it.*" If there had been any valid gift his father was already "out of it".

Again, in Defendants' Exhibit 24 (p. 147) Smith says: "As a matter of fact, all the personalty owned by my father at the time of his death belongs to me, and I have a paper showing that to be the case, and which can pretty nearly be construed as a will." The paper referred to is Defendants' Exhibit 25 (p. 150), in which J. W. Smith mentions the tin box in the Central Bank. Chas. H. Smith on another occasion, at a date not far distant from that of Defts'. Ex. 24, swore that the bonds in question were *in the tin box* (p. 151–2). So it is clear that at that time C. H. Smith's claim was by a *gift of the tin box*, which he falsely swore contained the bonds. When that theory was exploded, the assignment, after a long rest, comes to light; and when the assignment fails, the gift is attempted to be shown by declarations of the deceased *alone*, testified to after the lapse of six years, and unsupported by any testimony of any word or act of gift. Do such shifting and evasion appeal to the judgment of any court? Is such evidence sufficient to produce "moral certainty or con-

viction" in the minds of this Court?

The law raises no presumptions in favor of gifts, and where a claim of gift is asserted after the donor's death, it must be proved by clear and satisfactory evidence.

Denigan v. *Hibernia Bank*, 127 Cal. 137.
Denigan v. *S. F. Savings Union*, 127 Cal. 142;

But it takes other evidence to establish a gift than mere words. *There must be a delivery or its equivalent.*

In *Daniel* v. *Smith*, 64 Cal. 346, and *Daniel* v. *Smith*, 75 Cal. 548, in which 107 U. S. 602, was quoted approvingly, it was held that there must be a delivery of the thing in order to constitute a valid gift, and that the delivery must be such as to authorize the donee to *reduce the fund into possession.*

See also

Dow v. *Gould & C. S. M. Co.*, 31 Cal. 629.

In *Zeller* v. *Jordan*, 105 Cal. 143, where the opinion is written by Justice DeHaven, it is held that a gift *inter vivos must take effect at once*, and that there must be a delivery.

Does this oral gift, which is uncertain as to date, but which must have been made, if at all, before C. H. Smith left for Denver on the 2d or 3d of September, come within the rule of this decision, when there was *no delivery* until after J. W. Smith had sunk into a stupor from which he never rallied, and therefore none *to which he was a party?*

It is held in many cases that death before completion

of a gift by delivery will operate as a revocation.

14 Am. & Eng. Enc. of Law, 2d ed. p. 1016;
Permanent Fund v. *Hall*, 48 Ill. App. 536,
23d St. Baptist Church v. *Cornell*, 117 N. Y. 601.

Was not this last unconsciousness the equivalent of death?

So long as anything remains to be done to complete a gift it may be revoked by the donor.

14 Am. & Eng. Enc. of Law, 2d ed. p. 1016.

In *Ruiz* v. *Dow*, 113 Cal. 490, it is held that in order to effectuate a gift the donor must *divest himself absolutely* of any right to the thing given.

When J. W. Smith last closed his eyes upon this world, the alleged gift was not complete; there had been no delivery; it was revocable; his right to the bonds had not been absolutely divested; he had at that moment the right to their possession. Can it be possible, therefore, that a delivery afterwards but before death succeeded the stupor, is of any legal effect or value to complete the gift or give it vitality?

In *Hart* v. *Ketchum*, 121 Cal. 426, it is held that a mere purpose to give is not sufficient. *Delivery* by the donor with intent *at that time to vest title* is what makes the gift effectual.

What "intent" could have been in the mind of J. W. Smith at the time of the delivery of the bonds?

In *Knight* v. *Tripp*, 121 Cal. 674, it was held that the delivery of a key was not a sufficient delivery of a box

and contents. It was further held that the same requisites are necessary for a gift *inter vivos* as for gift *causa mortis*, and that the execution of a *written instrument* does not help a gift in the absence of delivery. This is a very interesting case.

A mere intention to give is a nullity.

14 Am. & Eng. Enc. of Law, 2d ed. 1017.

"Delivery must be actual, if possible. If not, some act equivalent thereto that has *the legal effect to pass the title* must be done in connection with or about the property."

Id., p. 1020.

"In some cases the delivery necessary to transfer the ownership of property by gift may be made by delivering to the donee the means of obtaining possession of the property, whereby he is put into constructive possession thereof. This occurs in the case of a gift of property contained in a trunk or chest, vault, room or building, where the donor, *with words of gift*, *delivers the key affording access to the property to the donee*, with the intention of placing him in possession."

Id., p. 1021;

Civil Code, Sec. 1147.

We ask, in all candor, is there any evidence in this case of actual or symbolical delivery of the bonds within the above rule? If so, where is it to be found? If not, the gift fails and the judgment must be reversed.

II.

But if, under any possible construction, the evidence can be held to be sufficient to show all of the elements

necessary to make a valid gift, can it be said to be sufficient where a confidential relation exists, and where suspicious circumstances appear in the transaction?

J. W. Smith was eighty years of age; in his last illness; feeble physically; incapable of caring for himself. His son was the exact reverse of this condition; assisted his father in his business matters; drew his deeds; advised with him concerning his property; corresponded with him; they had a common bank account. From this close relation C. H. Smith emerges with a deed to two-thirds of a block of land in Oakland, $212,000 in bonds, and a written assignment to evidence his title thereto which the trial Court casts aside as suspicious.

In this state of facts is it not the rule of law that such a gift is presumptively illegal, and the burden is upon the donee to overcome it by clear and positive testimony?

"The rule of law favoring gifts from parent to child will not hold where the circumstances are such as to raise the presumption that the gift was obtained by undue influence. Where the parent is enfeebled in mind and body, from age or other cause, and in a situation rendering probable the exercise of undue influence on the part of the child, the burden of proof rests upon the child claiming the gift to show that a gift was intended, *and that it was the voluntary, intelligent act of the donor.*"

14 Am. & Eng. Enc. of Law, 2d ed. p. 1036;
Stewart's Estate, 137 Pa. St. 175;
Collins v. *Collins*, 15 Atl. Rep. 849.

The alleged assignment, Plaintiff's "Exhibit G", is

not only a suspicious document in this connection, but strong evidence of undue influence, and of an intent to back up a fraudulent transaction. It recites that it was made "for value received" and on its face imports a sale, not a gift, while on the trial there was no pretence of a consideration. Under these circumstances this recital is evidence of undue influence.

Taylor v. *Taylor*, 8 How. 183;
Towson v. *Moore*, 173 U. S. 25.

See *Shirley* v. *Shirley*, 92 Cal. 44, to the effect that the evidence of a gift under such circumstances as are disclosed by this record, must be clear and strong.

And also *White* v. *Warren*, 120 Cal. 327, and *Denigan* v. *Hibernia Bank*, 127 Cal. 137, to the effect that there are no presumptions in favor of gifts.

Under the above decisions, the uncertain testimony that J. W. Smith had said that he had "given and turned over" the bonds to his son, does not come up to the requirements of the law. Such expressions are entirely consistent with a "turning over" of the bonds to C. H. Smith to hold as the property of and for the benefit of J. W. Smith. As was held by Justice Harrison in *White* v. *Warren*, 120 Cal. 327, such expressions are not the equivalent of words of gift. Justice Harrison says:

"Her statement that she had 'given' him the money was not equivalent to a declaration that she had made him a 'gift' of it, *since the term is often used as the equivalent of a mere delivery.*"

"Where a gift *inter vivos* is not asserted until after the death of the alleged donor, the evidence to sustain it must be as clear, strong and convincing as the evidence required to sustain a gift *causa mortis*. The rule in both cases rests upon the principle that *gifts first asserted after the death of the alleged donor are always regarded with suspicion by the courts*."

Matter of Manhardt, 44 N. Y. Supp. 836.

"In order that the rights of creditors may not be prejudiced, that the donor may not be circumvented by fraud, that he may be protected from undue influence which would result in an unequal and unjust distribution of his estate, and that efficacy may not be given to gifts made under legal incapacity, as well as on other grounds, it is held that gifts *inter vivos* are *watched with caution* by the courts, and that to sustain them *clear and convincing evidence is required*."

14 Am. & Eng. Ency. of Law, 2nd ed., p. 1049.

An admission by the donor, although evidence to be weighed by the jury as tending to establish a gift, *is not in itself sufficient proof of the gift.*

Rooney v. *Minor*, 56 Vt. 527.

For the reasons above set out we ask that the judgment of the Circuit Court be reversed.

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